

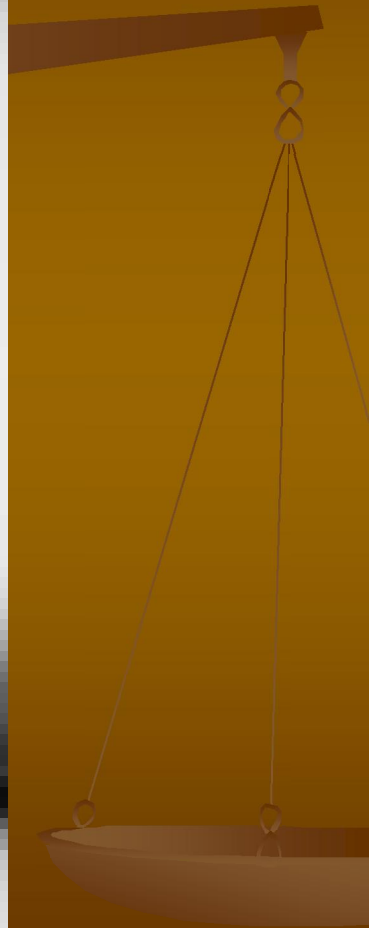
# **Confrontation After** **Crawford**

**John Rhodes**

**Assistant Federal Defender**

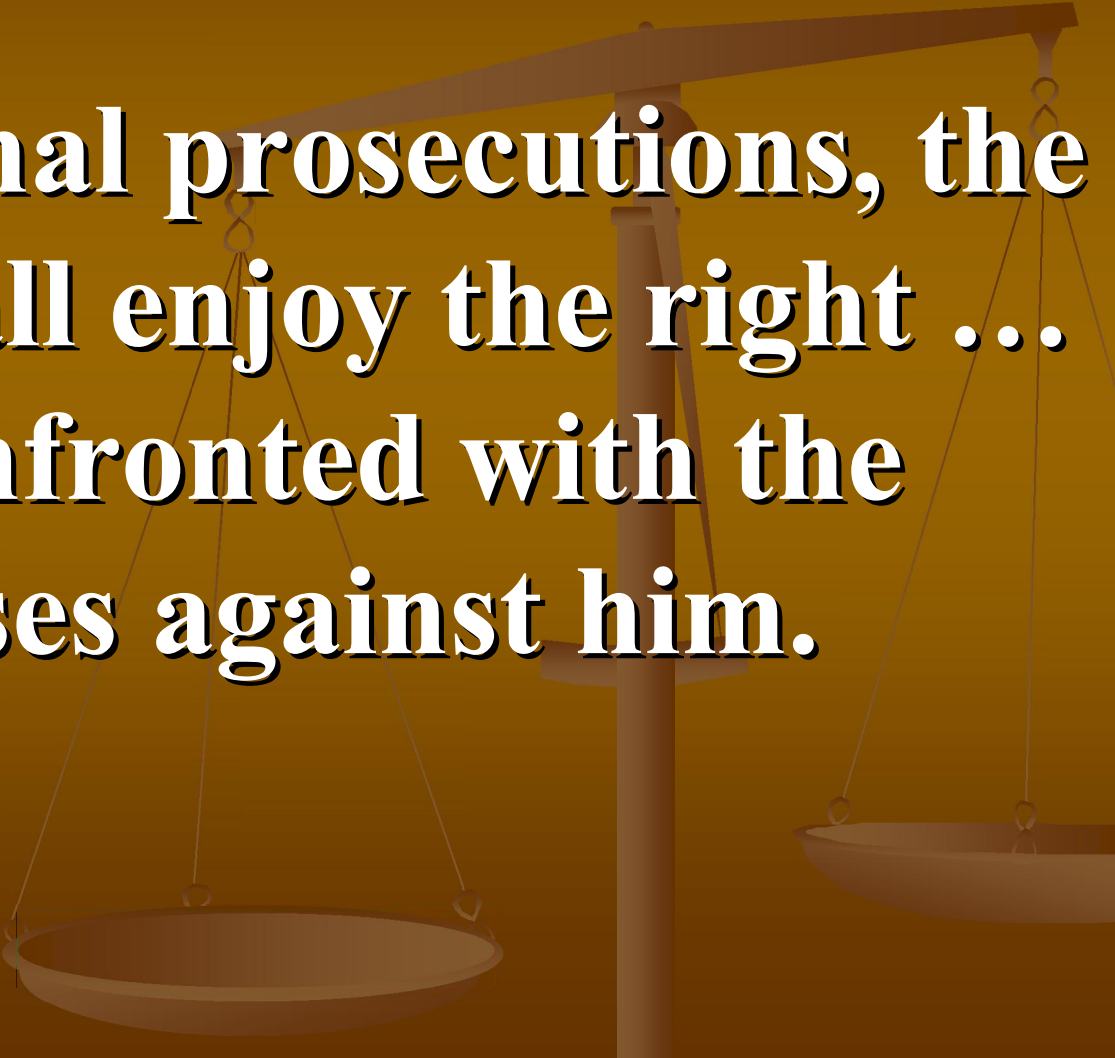
**Federal Defenders of Montana**





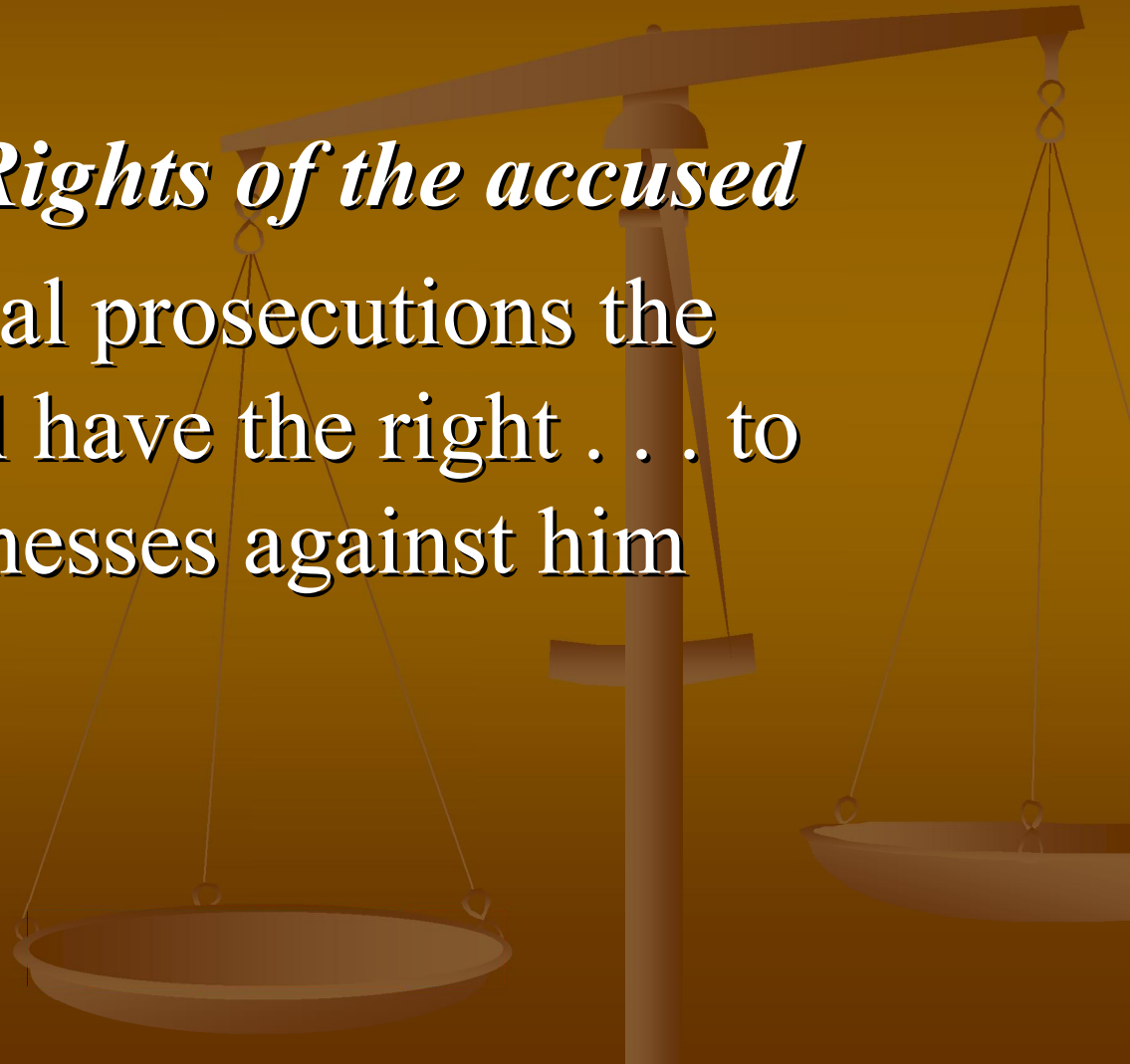
# The Sixth Amendment

**In all criminal prosecutions, the accused shall enjoy the right ...  
to be confronted with the  
witnesses against him.**



# Montana Constitution

- Article II
- Section 24. *Rights of the accused*
- In all criminal prosecutions the accused shall have the right . . . to meet the witnesses against him face to face



# Confrontation *Before*

## Crawford:

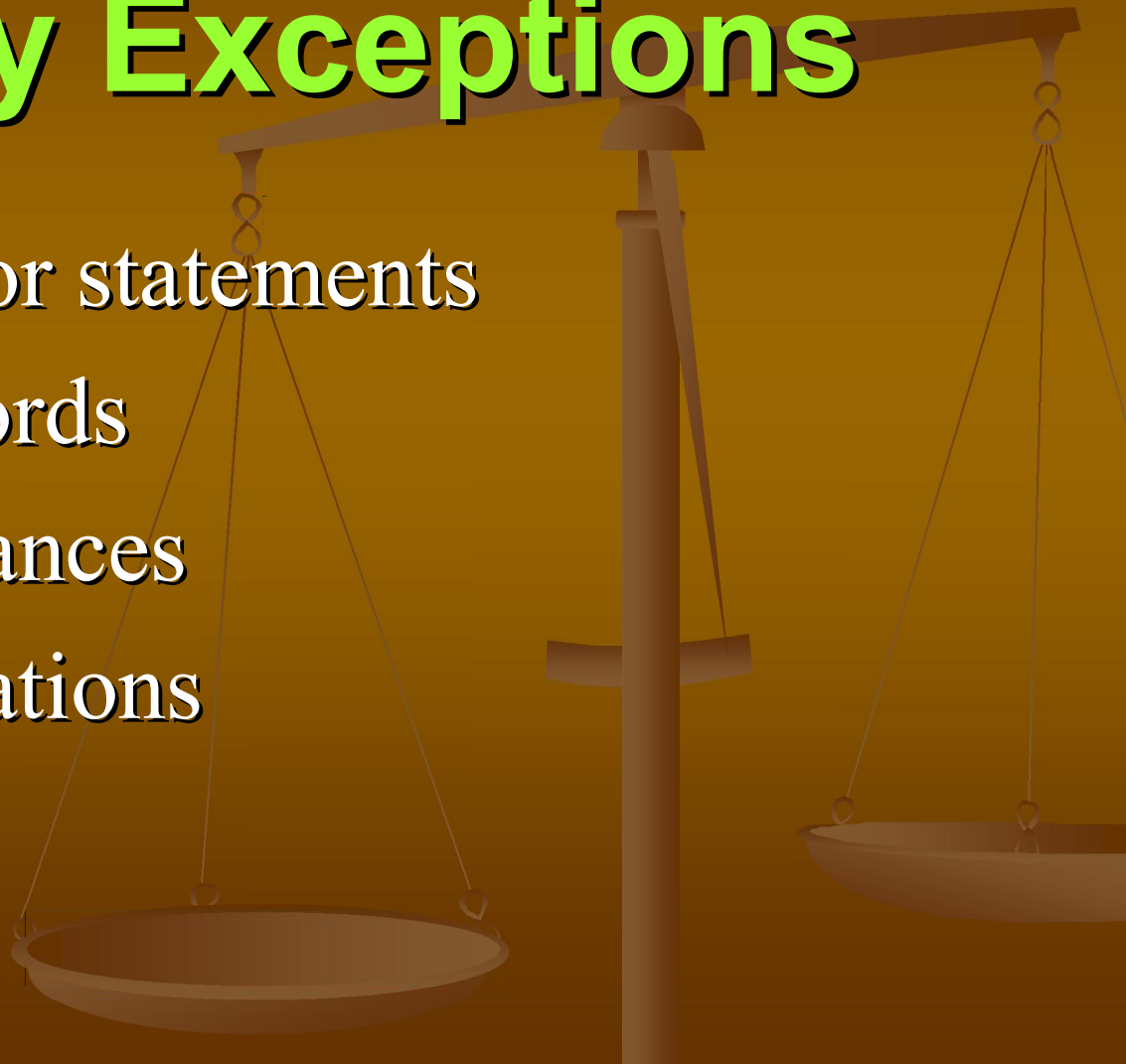
Ohio v. Roberts, 448 U.S. 56 (1980)

Unavailable witness's statement may be admitted if it bears “adequate indicia of reliability.”

To meet that test, the evidence must either fall within a “firmly rooted hearsay exception” *or* bear “particularized guarantees of trustworthiness.”

# **“Firmly Rooted” Hearsay Exceptions**

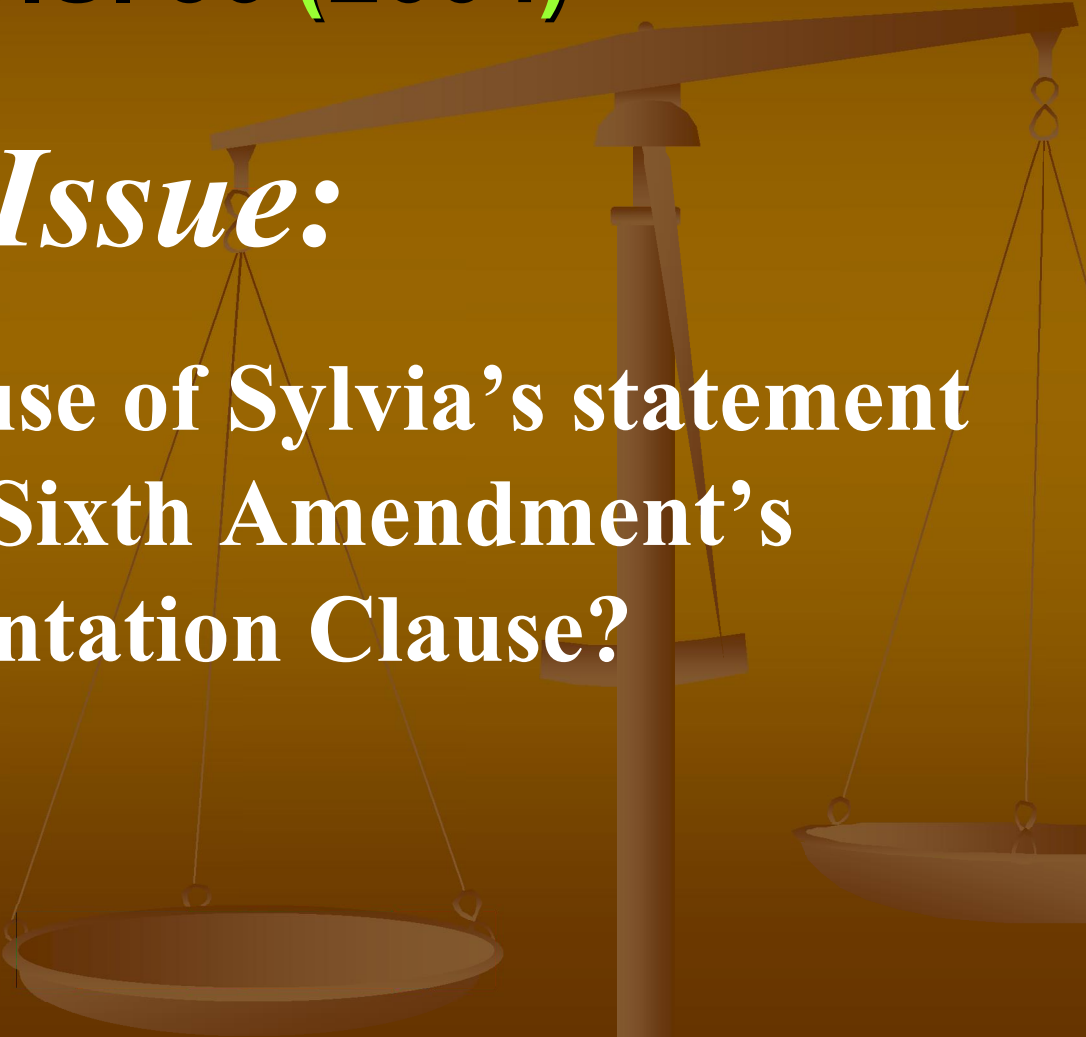
- co-conspirator statements
- business records
- excited utterances
- dying declarations



# Crawford v. Washington, 541 U.S. 36 (2004)

## *Issue:*

Did the state's use of Sylvia's statement  
violate the Sixth Amendment's  
Confrontation Clause?



# Justice Scalia's Analysis:



- (1) Clause was directed at the “evil” of using *ex parte* examinations as evidence against the accused
- (2) Framers would not have allowed testimonial statements of a witness who did not appear at trial unless he was unavailable to testify, and the defendant

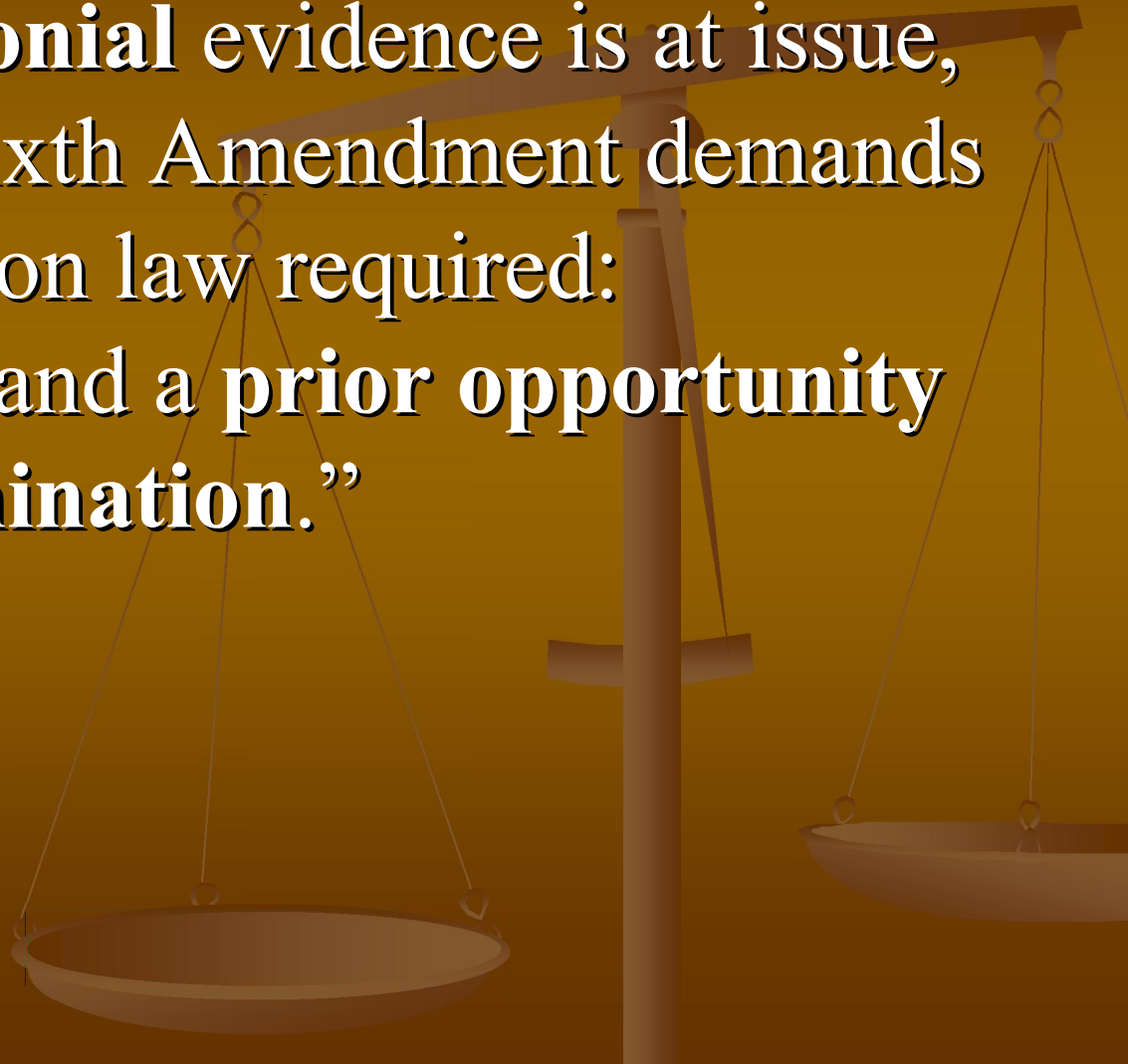


# Crawford's Holding

- “Where nontestimonial hearsay is at issue, it is wholly inconsistent with the Framers’ design to afford the States flexibility in the development of hearsay law – as does [Ohio v. Roberts], and as would an approach that exempted such statements from the Confrontation Clause altogether.”

# Crawford's Holding

- “Where **testimonial** evidence is at issue, however, the Sixth Amendment demands what the common law required: **unavailability** and a **prior opportunity for cross-examination.**”



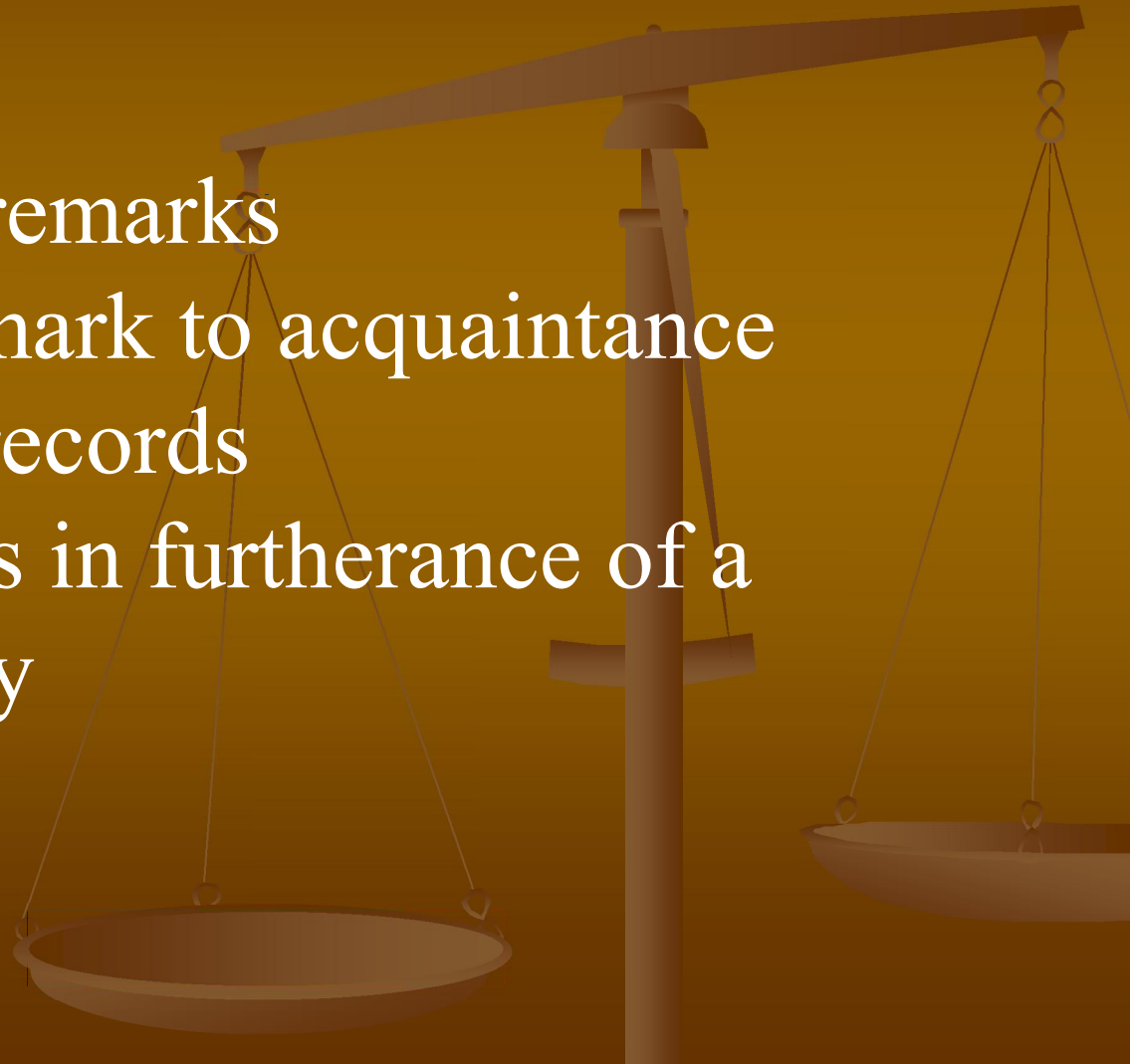
# ? What is

- ✓ **“testimonial”** prior testimony: preliminary hearing, grand jury, deposition, former trial
- ✓ ex parte affidavits
- ✓ police interrogations
- ✓ guilty pleas

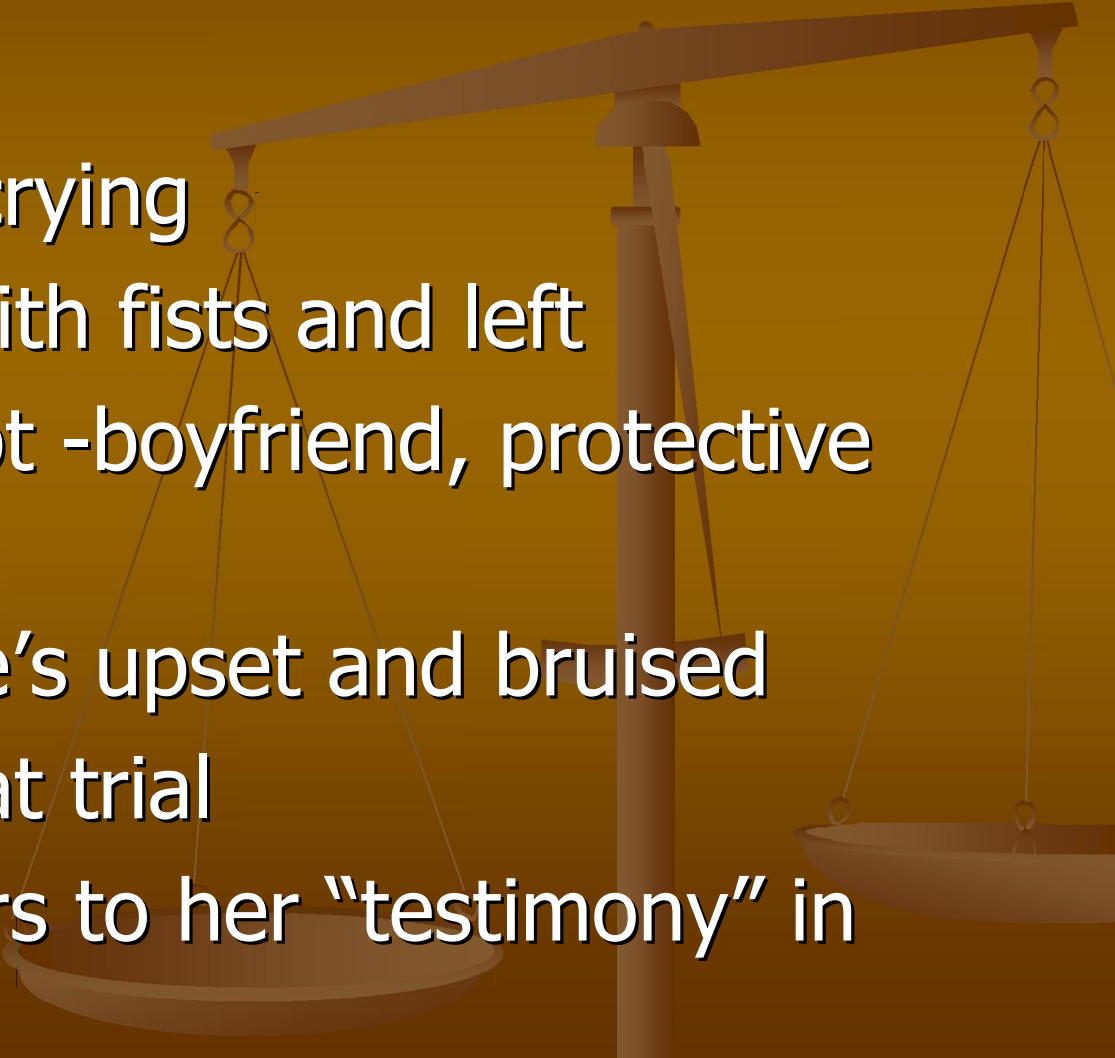


# ? What is NOT “testimonial”

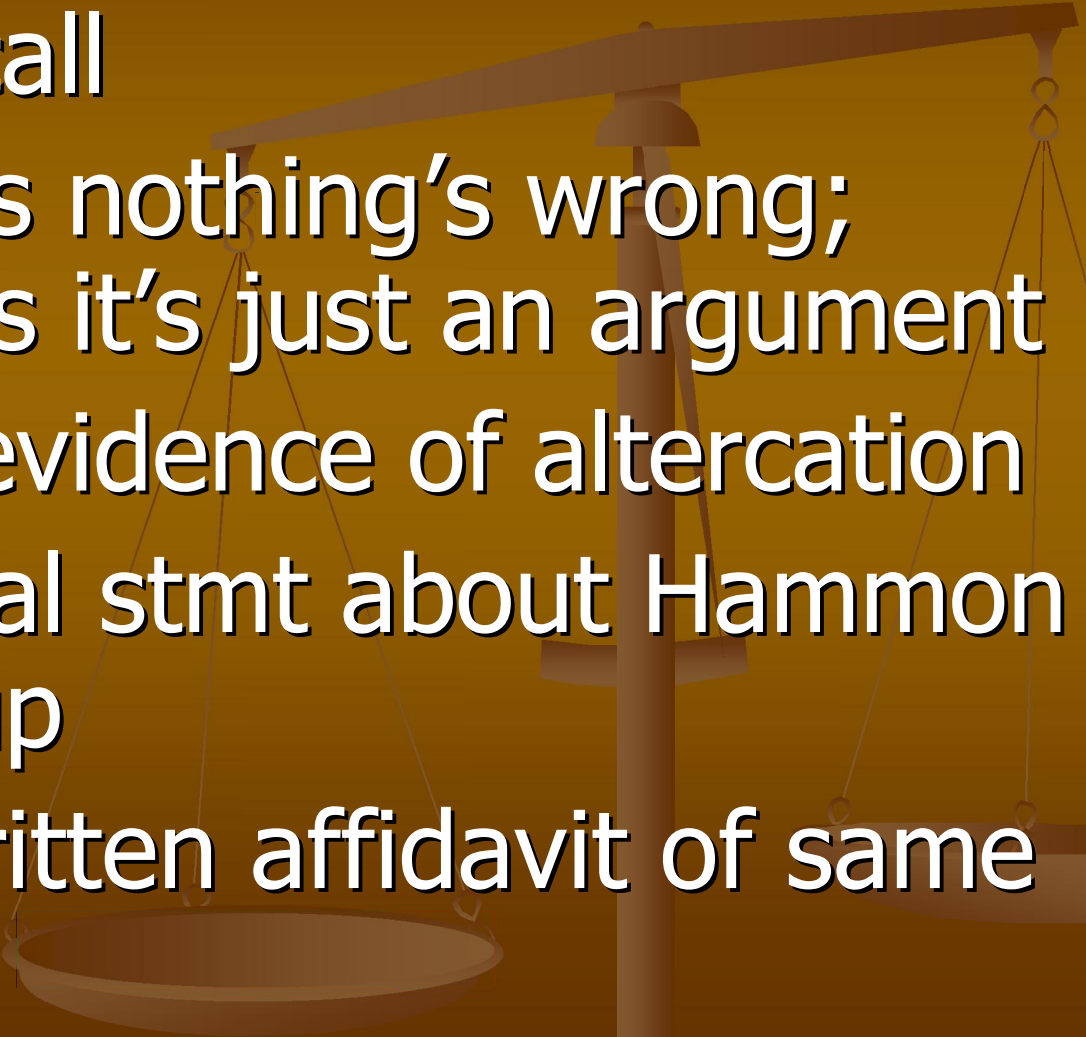
- X off-hand remarks
- X casual remark to acquaintance
- X business records
- X statements in furtherance of a conspiracy



# Davis v. Washington, 126 S.Ct. 2266 (2006)

- 911 Call
  - Hysterical and crying
  - Man beat her with fists and left
  - Dispatcher script -boyfriend, protective order
  - Cops arrive, she's upset and bruised
  - Doesn't testify at trial
  - Prosecutor refers to her "testimony" in argument
- 

# Hammon Facts

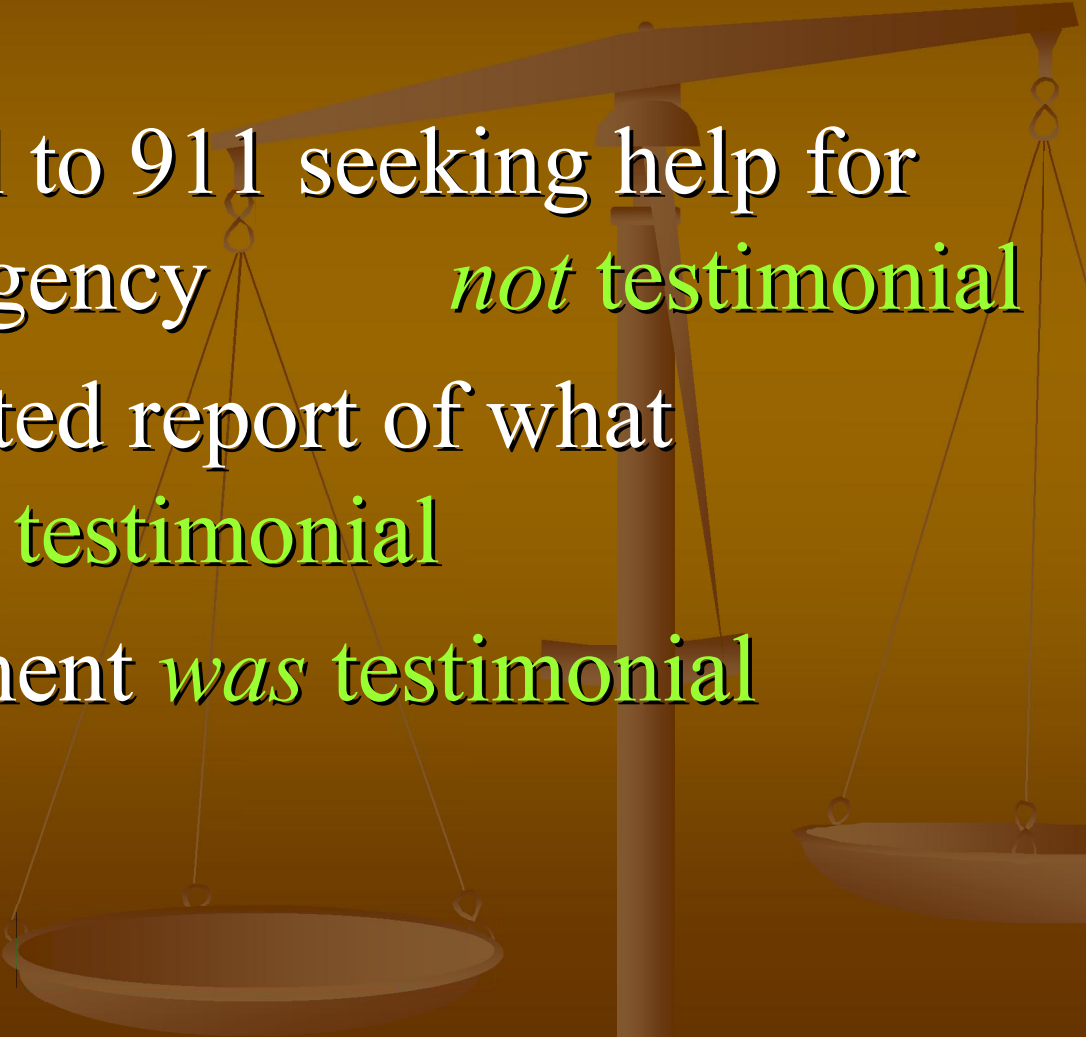
- Officer responds to domestic disturbance call
  - Amy first says nothing's wrong; Hammon says it's just an argument
  - Officer sees evidence of altercation
  - Amy gives oral stmt about Hammon beating her up
  - Amy gives written affidavit of same
- 

# Davis v. Washington,

126 S.Ct. 2266 (2006)

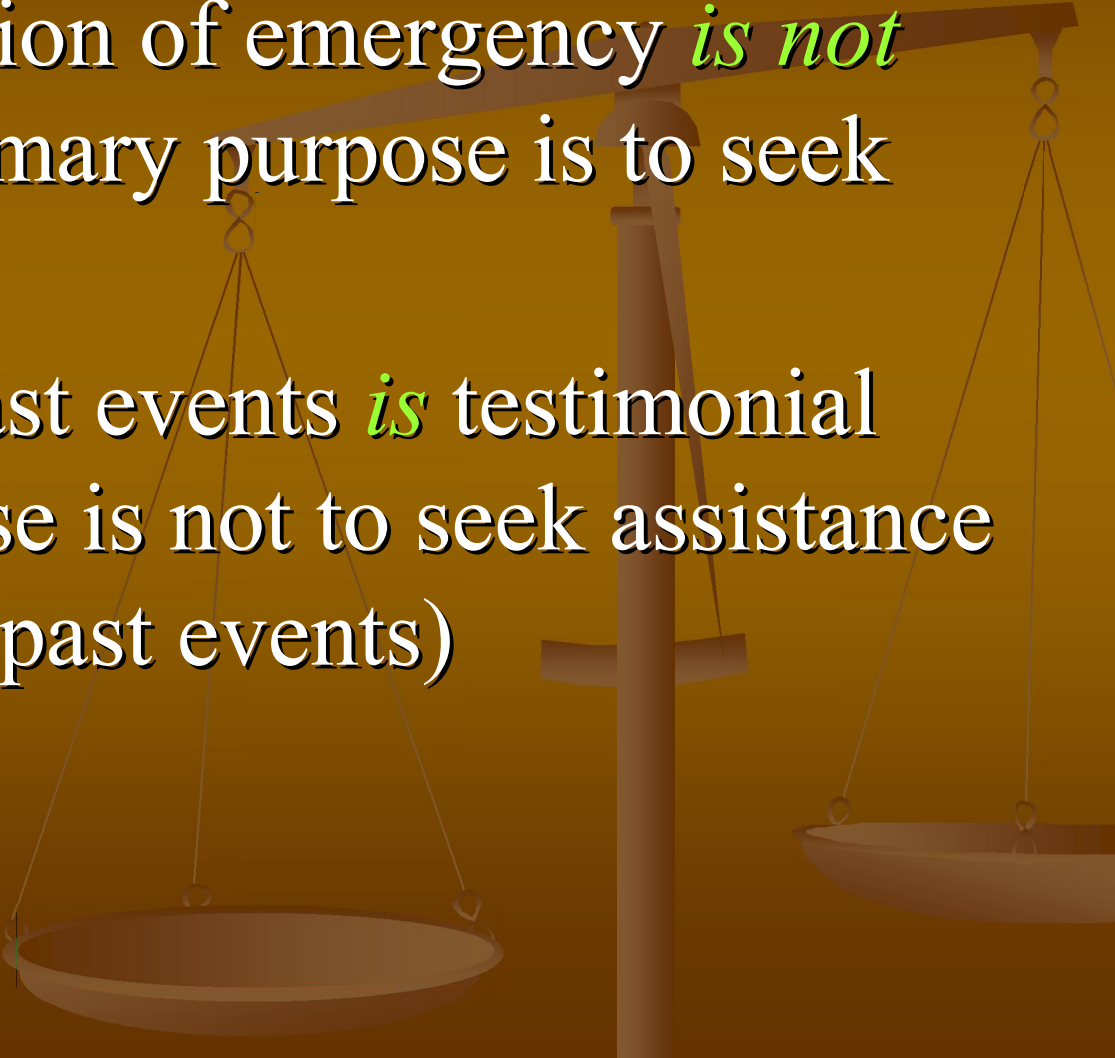
- Testimonial or not?
  - Statements *are not* testimonial if circumstances *objectively indicated* the *primary purpose* was to seek assistance in an ongoing emergency.
  - Statements *are* testimonial if their *primary purpose* is to establish past events relevant to criminal prosecution.
- Non-testimony may evolve into testimony

# Davis Applied

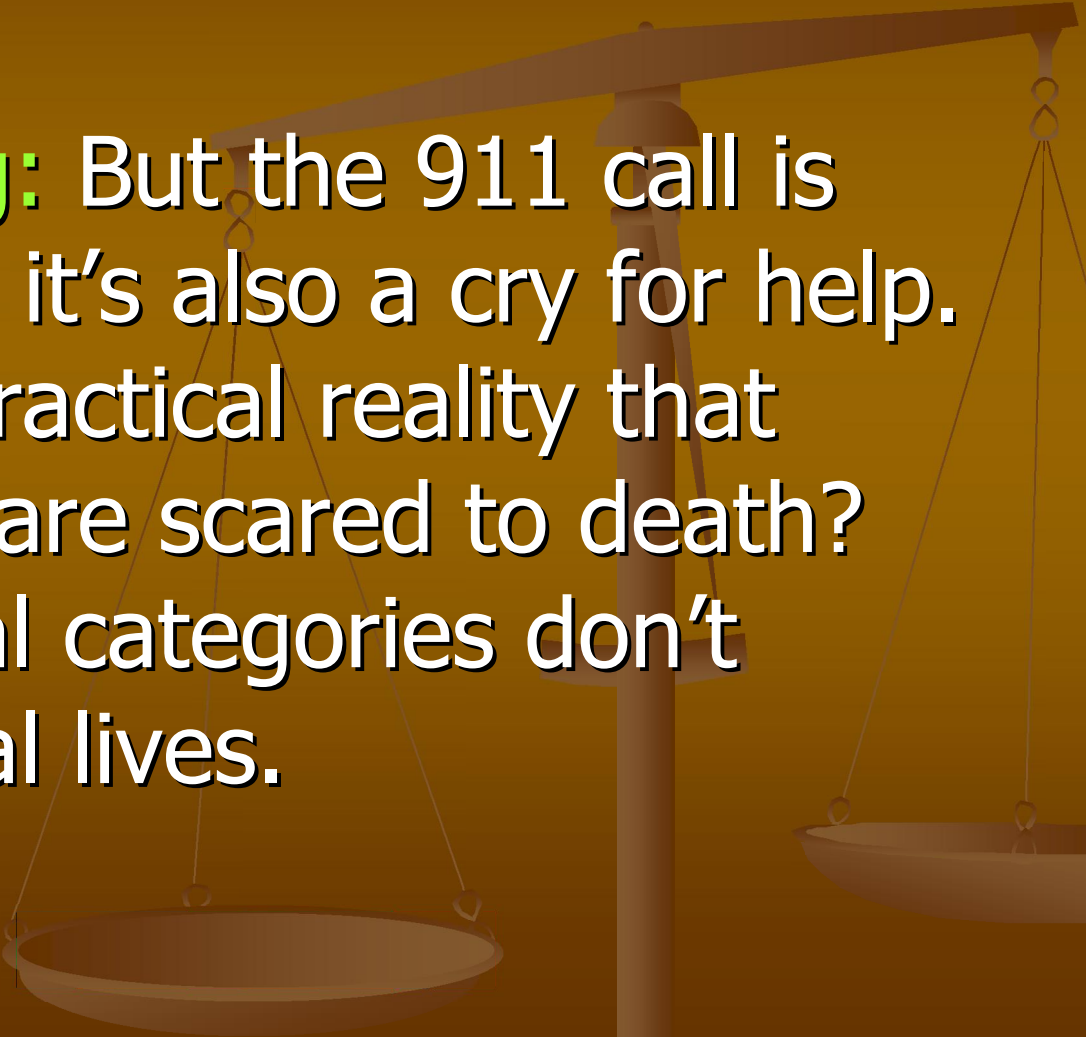
- 
1. Hysterical call to 911 seeking help for ongoing emergency *not testimonial*
  2. On scene excited report of what happened *was testimonial*
  3. Written statement *was testimonial*



# Essential Holdings in Davis

- Ongoing recitation of emergency *is not* testimonial (primary purpose is to seek assistance)
  - Recitation of past events *is* testimonial (primary purpose is not to seek assistance but to establish past events)
- 

# Potential Domestic Abuse Exception



**Justice Ginsburg:** But the 911 call is not just a call, it's also a cry for help. Was it not a practical reality that many women are scared to death? Your neat legal categories don't conform to real lives.

# Potential Domestic Abuse Exception

- Forfeiture by wrongdoing
- If defendant intimidates witness, testimony may be admitted anyway

(You can always try **J.Scalia's** retort to **J.Ginsburg**: Maybe we should just suspend the Confrontation Clause in spousal abuse cases!)

# Object Object Object

And *Constitutionalize* Your  
Objection!!!

